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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

CHAMBER SUMMONS NO. 60 OF 2004  
IN  
EXECUTION APPLICATION NO. 461 OF 2003  
IN  
SUMMONS FOR JUDGMENT NO. 170 OF 2001  
IN  
SUMMARY SUIT NO. 228 O 2000

Vibra Fibre P. Ltd       .... Plaintiff  
VS.  
Aryaman Financial Services Ltd ....Defendant  
AND  
Rajneesh Agarwal & Associates  
P. Ltd                               ....Applicant

Virag V. Tulzapurkar with Ms. A. Kaushik i/b.  
Udwadia and Udeshi for the plaintiffs.  
Rajesh S. Datar for the applicants.  
Ms. Kokila i/b. Manjula Rao for the defendants.

CORAM : S.U. KAMDAR, J.

DATE : 6TH APRIL, 2005.

JUDGMENT :

1. The present chamber summons is taken out by the applicant inter-alia for raising an attachment under

order 21 rule 54 of the CPC in respect of office premises bearing no.35 situated on the 3rd floor, Atlanta Building, Nariman Point, Mumbai-400 021. This chamber summons is taken out in the background of the facts which briefly stated are as under :

2. On 3/12/2002 the plaintiff filed a summary suit in this court being Summary Suit no. 2228 of 2000. The said suit was for the recovery of Rs.40,00,000/- with interest thereon. A summons for judgment was taken out being no. 170 of 2001 and in the said summons for judgment a decree came to be passed against the defendant for the sum of Rs.84,97,476/-.

3. It is an admitted position that the defendant judgment debtor was the owner of a premise bearing no. 35 situated in Atlanta Building, Nariman Point, Mumbai-21. The defendant proposed to sell the said premises to the applicant herein and in pursuance of the said arrangement which was to be finalised, both the parties approached to the co-operative society known as 'Atlanta Premises Co-operative Society Ltd ' who in turn issued No Objection certificate for sale

of the said premises on 5.2.2003. It is the case of the applicant that the Chartered Accountant appointed by him took search in the office of the register of companies and ultimately found that there is no charge registered in respect of the said premises. thus on 23/2/2003 an agreement for sale was executed between the defendant and the applicant herein in respect of the said office premises bearing no.35 in the building Atlanta. The said agreement was for a total consideration for a sum of Rs.70,00,000/- and it is the case of the applicant had he has paid from time to time to the defendant judgment debtor the entire consideration amount of Rs.70,00,000/- for purchase of the said flat. On 24.3.2003 the applicant approached the Saraswat Bank for financial assistance in respect of the said office premises. On 28/3/2003 the society gave its consent for mortgage of the said office premises to Saraswat Bank Ltd. It is the case of the applicant that he was put in possession in pursuance of the said agreement for sale dated 17.4.2003 and he is in use, occupation and possession of the property since then. On 16.6.2003 the applicant made an application to the society

seeking permission to renovate the said office premises and paid the society necessary charges and renovation deposit. On 17.6.2003 the society issued necessary payment receipts to the applicant herein and the office work for renovation has been commenced by the applicant herein. On 19.7.2003 a stop work notice was issued by the BMC in respect of the renovation work undertaken by him on 21.7.2003. The applicant herein complied with the said conditions of the stops work notice and accordingly the same was withdrawn. The aforesaid circumstances are relied upon by the applicant to indicate their possession of the premises to claim benefits of section 53 A of Transfer of Property Act.

4. In the meantime the plaintiff has moved an execution application for execution of the decree and on 11.12.2003 levied an attachment on the said premises. However it is the case of the plaintiff that the applicant resisted the said attachment and accordingly the attachment could not be levied. Thus on 15.12.2003 ultimately the bailiff attached the

said premises and warrant of attachment was executed in respect of the same. It is the case of the applicant that the said attachment of the properties in pursuance of the execution of the warrant of attachment is illegal unlawful and right of the applicant cannot be affected in execution of the said decree. It is further the case of the applicant that the applicant not being judgment debtor is not liable to make payment as claimed by the plaintiff and therefore the property of the applicant cannot be made subject matter of attachment and sale in execution of the said decree passed against the defendant judgment debtor. It is further the case of the applicant that the applicant is the bonafide purchaser in respect of the said office premises unaware of the claim of the plaintiffs herein and he has already paid entire consideration, the equitable title is vested in him though the shares are not transferred in favour of the applicant. It is a further case of the applicant that he is in lawful possession of the said premises and in any event even if the shares is not transferred he is in possession in part performance of the agreement for sale which

is executed in his favour and by virtue of the provisions of section 53 A of the Transfer of Property Act, 1872 he is entitled to continue in possession of the said premises and his right in the said property cannot be affected.

5. On the other hand learned counsel appearing for the plaintiff decree holder has contended that there is no valid vesting of title in favour of the applicant herein because it is well settled that mere agreement for sale does not create any right, title and interest in the property. It has been further contended that even assuming that there is any right, title and interest in favour of the applicant the same has to be disregarded by this court by virtue of the provisions of section 60 subsection 2 of the CPC which is amended by the amending Act, 22 of 2002. It has been contended that in view of the amended provisions it is now necessary to get the agreement for sale registered if the bonafide purchaser seeks to protect his property as against the decree holder and if such an agreement is not registered then by virtue of the provisions of section 60 sub-section 2

such a transaction has to be ignored and the decree can be executed against the said properties. It is alternatively contended that on plain reading of the terms and conditions of the sale it is clear that the said agreement has come to an end by virtue of the terms and conditions thereof because admittedly the said terms are not complied with by the applicant. The agreement provides that if such terms and conditions are not complied with within the time and time being essence of the contract then in that event the said agreement automatically comes to an end. Thus the learned counsel for the plaintiff has contended that by virtue of the terms and conditions of the agreement on which the applicant himself relied upon it is clear that there is no valid agreement as of now and that warrant of attachment can be executed as against the said property. The learned counsel for the plaintiff has relied upon the judgment of the learned single judge in the case of **Sumikin Bussan International (Hong Kong) vs. Manharlal T. Mody and Mrs. Kalpu R. Gandhi and Anr.** passed in Chamber Summons No.242/04 in Execution application no. 18 of 2004 in which the

provisions of sub-section 2 of section 64 has been considered by the learned single judge in para 12 of the judgment it is held as under :

"12. The C.P.C. amendment Act 2002 (22 of 2002) with effect from 1st July, 2002, has introduced basically sub-section (2) of section 64 to the Civil Procedure Code. The above referred amended provision has been code. The above referred amended provision has been inserted on the basis of 54th Law Commission. Specially, in view of the various conflicting issues relating to the transfers, which were entered into before or after order of attachment, and to avoid abuse and practice of entering into such antedated agreements or contracts and such other transactions. Sub-section (2) as referred above, now, contemplate that any private transfer or delivery of the property or of any interest therein, made in pursuance to such contract, and same if, registered before the attachment, then such transfer or delivery will not be affected by the attachment order, as contemplated under the provisions of section 64 of CPC. Therefore, any private alienation of the property through any contract, if, registered prior to the date of the attachment, such sale or delivery or transfer, would prevail over the order of attachment of such property. Now, therefore, registration of such document before attachment order is a must, to claim right over the property under the attachment."

6. The said matter was carried further in appeal before the division bench of this court in Appeal no. 612 of 2004 the division bench in its order and judgment dated 30.9.2004 as wholly upheld the judgment of the learned single judge as held as under :

"3. The agreement for sale by itself does not create any interest in or charge on the immovable property. This is what is provided in section 54 of the Transfer of Property Act. The person has to establish his right, title or interest in the property independent of the judgment debtor in the application under order 21 rule 58 CPC for raising the attachment. Under section 64 of the Code of Civil Procedure, any private transfer or delivery of the property after the attachment is void. However, sub-section (2) of section 64 carves out an exception in respect of private transfer or an delivery of the property attached or any interest therein made in pursuance of any contract entered into and registered before the attachment. Firstly as already noticed above the agreement of sale by itself does not create any interest in or charge on the immovable property. It only entitles the party to seek specific performance. Secondly, for getting benefit of section 64(2) CPC., the agreement is not only required to be of the date before the property was attached but also such agreement has to be registered. The learned counsel for

the appellant sought to urge that such agreement in law was not required to be registered as it related to the shares of the Co-operative society, we are afraid, the argument of the learned counsel for the appellants cannot be accepted."

7. The learned counsel has also contended that the aforesaid amendment has been brought into operation especially because of the judgment of the apex court in the case of **Vannarakkal Kallalathil Sreedharan vs. Chandramaath Balakrishna and Anr.** reported in 1990 3 SCC 291 and in view thereof the agreement for sale in favour of the applicant cannot be held to be valid. In the present case the learned counsel for the plaintiff has contended that though the agreement for sale is entered into prior to the date of attachment of property i.e. agreement for sale is dated 23.2.2003 whereas the attachment is levied on 15.12.2003 still by virtue of fact that the said agreement is not registered as required under sub-section 2 section 64 of the CPC, 1908 the sale cannot be given effect to and it cannot supercede the warrant of attachment and sale must proceed in

execution of decree passed by this Court. On the other hand the learned counsel for the applicant has relied upon the following judgments. It has relied upon the judgment of the apex court in the case of **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and Anr.** reported in AIR 1997 SC 856 and it is been contended that he being in possession of the said property in part performance of the agreement his rights cannot be defeated by seeking his eviction in the execution of the decree. Learned counsel has also relied upon the judgment of the apex court in the case of Vannarakkal Kallalathil Sreedharan (supra). In my opinion the aforesaid judgment has no relevance to the facts of the present case. In so far as Vannarakkal Kallalathil Sreedharan (supra) is concerned the said judgment is no more applicable in view of the subsequent amendment of CPC and by virtue of introduction of sub-section 2 of section 60 which inter-alia now makes it compulsory that the agreement must be registered if the decree has to be defeated by virtue of the prior rights created in the said property. In so far as the judgment of Bramhadeo Chaudhary (supra) is concerned the same has no

relevance because that was the case totally different where the court has passed an order of dispossession before considering the case of obstructionist. The respondent in that case was claiming independent right, title and interest in the said property and not through the judgment debtor. Thereafter the learned counsel has relied upon the judgment of the Madras High court in the case of **Gokarakonda Audinarayudu vs. Surapureddi Mangamma** reported in **AIR (30) 1943 Madras 706**. The aforesaid judgment is relied upon to claim that he being in part performance of the property under section 53 A of the Transfer of Property Act is entitled to protect his possession as against the third party.

8. Learned counsel for the applicant has thereafter relied upon the judgment of the Sikkim High court in the case of **Tshering Wongdi Bhutia vs. Sonam Pintso and Ors.** report in **AIR 1981 Sikkim page 1**. It has been contended that an objector in possession of the land in part performance is entitled to defeat the decree. It is also contended that in the said

judgment also there was an unregistered sale deed. By relying upon the aforesaid judgment it has been contended that in the present case also irrespective of the registration of the agreement, the applicant is entitled to the said property under doctrine of part performance under s.53 A of Transfer of Property Act and therefore entitled to the reliefs of raising an attachment because the agreement is executed prior to the date of levy of an attachment. In my opinion the aforesaid judgment has no application in view of the amendment brought into effect in 2002 to s. 64(2) of Civil Procedure Code and thus cannot be treated as a good law. The learned counsel has thereafter cited a judgment in the case of **Nathulal vs. Phoolchand reported in AIR 1970 SC page 546** and it has been contended that the defence of part performance is available to the person who has acquired the property from the judgment debtor. It has been contended that under s. 53 A of the Transfer of Property Act if the essential conditions stipulated therein are complied with then whether the contract is registered or not is an irrelevant factor and thus the applicant is entitled to the benefits. The learned counsel has

also cited the judgement of the apex court in the case of **Sardar Govindrao Mahadik and Anr. vs. Devi Sahai and Ors** reported in **AIR 1982 SC page 989** as well as the judgment in the case of **Dharmaji alias Baban Bajirao Shinde vs. Jagannath Shankar Jadhav** reported in **AIR 1994 Bombay page 254**. In my opinion the aforesaid judgments cited by the learned counsel relying upon s. 53 A of the Act has no application to the present case. The provisions of s.53 A of the Act inter-alia prescribed that any person who is a party to the contract transfers for consideration any immovable property and puts in possession the other person in part performance of the contract then such person in possession is entitled to the benefit of remaining in possession then notwithstanding that the contract was required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed by the law for the time being in force. These provisions are in my view applicable only as against transferor or any person claiming under him. The provisions of s.53 A are not applicable in cases where a decree is executed by a

third party i.e. a person who is neither a party to the agreement nor claiming through any such person under the agreement. The judgments cited by the learned counsel therefore does not apply to the fact of the present case. The requirement of registration provided under sub-section 2 of Section 64 of the Act is an independent requirement and especially provided for the persons who are claiming independent rights in the property so as to defeat the execution of the decree. Thus it is clear that unless the agreement is registered if executed by the judgment debtor prior to the levy of attachment then such a transfer cannot be accepted as a valid transfer in favour of such a third party purchaser unless the same is registered. The provisions of s.53 A does not take into consideration any such eventualities where the rights are transferred by the judgment debtor in favour of third parties so as to avoid execution of decree against his properties. In the light of the aforesaid facts I do not find any substances in the contentions advanced by the learned counsel for the applicant in so far as the same are based on section 53 A of the Transfer of Property Act are condoned.

9. In the present case admittedly the agreement is executed by the judgment debtor in favour of the applicant after the date of the decree but before the date of attachment of the said property. The said agreement admittedly is not registered as required under sub-section 2 of section 64 of the Act. In view thereof I do not find any merits in the contentions advanced by the learned counsel for the applicant. Thus I accordingly dismiss the present chamber summons. However there shall be no order as to costs.

. Learned counsel appearing for the applicants seeks stay of the present order. Parties are directed to maintain complete status quo and not to proceed further with the execution for a period of two weeks from today.

sd/-

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